

Service Date: December 20, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of	)	
MONTANA POWER COMPANY for	)	UTILITY DIVISION
Approval of Special Service Contracts to	)	
Prevent Uneconomic Bypass of Regulated	)	DOCKET NO. D2000.7.98
Distribution Facilities.	)	ORDER NO. 6470

ORDER ON APPLICATION TO APPROVE SPECIAL SERVICE CONTRACTS

Introduction and Background

1. On July 6, 2000 The Montana Power Company (now NorthWestern Energy (NWE)) filed an Application for approval of special service contracts with its customers Louisiana Pacific Corporation (LP) and Barretts Mineral, Inc. (Barretts). LP purchases electricity from NWE for its particle board plant in Missoula; Barretts purchases electricity from NWE for its talc plant near Dillon.

2. In its Application NWE explained that representatives of LP and Barretts approached NWE seeking lower electricity costs. At that time LP and Barretts took service as "G-1 primary" customers (Schedule No. GSEDS-1, General Service Electric Delivery Service), because they were served off NWE owned distribution plant. According to NWE, LP and Barretts indicated they could build their own distribution plant, connect to NWE at its substation, and thus qualify as "GS-2 Substation" customers (Schedule No. GSEDS-2, General Service Substation/ Transmission Level Electric Delivery Service). According to NWE, if LP and Barretts qualified for GS-2 service instead of GS-1 service they would gain "substantial savings" and NWE would suffer "substantial revenue shortfall."

3. To avoid what it contended would be "uneconomic bypass," (LP and Barretts constructing their own distribution facilities to connect directly to NWE at its substation) NWE entered into special service contracts with LP and Barretts, pursuant to which, since August of 1999, it has sold electricity to LP and Barretts at the GS-2 rate. In its Application NWE argues that the special service contracts should be approved because they benefit LP and Barretts, and

they benefit remaining customers because they avoid uneconomic bypass. To address the forgone revenue created by the contracts NWE asked the Commission to approve an accounting order, allowing for the recording of deferred revenue until such time as it could be recovered from other electricity customers.

4. On November 28, 2000 the Montana Public Service Commission (Commission) issued a Notice of Application, Opportunity to Comment and/or Intervene and Request Public Hearing (Notice). The Notice asked for responses to specific questions about the Application. No request for hearing was received. Intervention was granted to LP, Barretts, Montana Consumer Counsel (MCC) and PPL Montana, LLC and PPL EnergyPlus, LLC (PPL). Beyond its request for intervention PPL has not participated in the docket. MCC commented on statutes that may be relevant to the Application and indicated its support in the past for special rates that avoid uneconomic bypass. MCC did not clearly indicate support for this Application. In January of 2001 LP, Barretts and NWE filed extensive comments in support of the Application, and in response to the Notice. Commission staff submitted data requests on the Application on July 28, 2000. NWE responded to the data requests on September 1, 2000.

5. On October 8, 2002 the Commission voted to deny the special service contracts (and by implication all other requests associated with the Application). On October 16, 2002, pursuant to informal request, the Commission suspended its earlier action "for 30 days in order to give parties to the docket time to consider and submit a proposal, or proposals, to the Commission." NCA, October 18, 2002. The deadline for proposals was November 15, 2002.

6. NWE, LP and Barretts submitted separate but similar proposals by the deadline. The proposals are a significant modification of the original Application. The proposals indicate that in the special service contracts NWE entered into lease agreements with LP and Barretts for the distribution plant that connects the facilities to the NWE substations.<sup>1</sup> As such, NWE, LP and Barretts contend that leasehold interests in the distribution plant qualified LP and Barretts for the lower GS-2 schedule rate. All parties in their proposals ask the Commission to, in effect, declare that LP and Barretts have been lawfully served under the GS-2 schedule since August of 1999,

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<sup>1</sup> NWE and LP disagree over whether the agreement was for LP to purchase the distribution plant, but they agree that the agreement was for "at least a leasehold interest."

the time at which NWE began charging them the lower rate under the special service contracts. In addition, NWE requests an accounting order to record deferred revenue from August 1999 through June 2003, at which time other GS-1 Primary Class customers would assume the revenue shortfall. This proposal is a change from the initial Application, which proposed that the revenue shortfall be assumed by all distribution customers.

#### Discussion and Decisions

7. The Commission will not approve NWE's Application, as amended by its proposal and supplemented by proposals from LP and Barretts.

8. An electricity customer of NWE has a right to be served, and NWE has an obligation to serve, under the rates and terms of the tariff (schedule) for which the customer qualifies. Customer characteristics may change, resulting in qualification for service under a tariff previously not available to the customer. NWE does not need Commission approval to serve a customer under a tariff for which the customer did not previously qualify, but because of changed circumstances presently qualifies. Even if there is ambiguity about customer qualifications, NWE is not required to seek Commission approval; but, in such a situation NWE is at risk of a subsequent adverse Commission decision, and the revenue impacts that could result from such a decision.

9. In this case NWE initially did not contend that LP and Barretts qualified for the lower GS-2 rate. Rather, NWE concluded that it was threatened by LP and Barretts with an uneconomic bypass, and therefore offered the lower rate by means of special service contracts. It was not until later that NWE argued that LP and Barretts were charged at the lower GS-2 rate because they qualified to take service under the GS-2 schedule.

10. Absent Commission permission, NWE may not charge at other than the tariffed rate for regulated service. NWE may not by special contract alter the tariffed rate or other terms and conditions specified by the tariff. The facts presented by NWE in its initial Application were an admission of unlawful conduct, and an indication that such conduct would occur in the future in similar circumstances. Offering regulated service in violation of tariff may subject a utility to fines and penalties.

11. On this record and process the Commission will not declare that the special service contracts entered into with NWE by LP and Barretts qualified those customers for GS-2 service beginning in August of 1999. The GS-2 schedule does not explicitly equate a leasehold interest with an ownership interest for purposes of qualifying under the schedule. It may be that the parties are correct that the Commission should find a leasehold sufficient by implication, or that the tariff should be amended to include a leasehold explicitly. However, the Commission will not make such a decision, which may have regulatory consequences for other customers and utilities, in the absence of a process that allows for careful consideration of the question.

12. Neither will the Commission under these circumstances approve an accounting order. Accounting orders are normally for the purpose of authorizing a utility to record extraordinary and uncontrollable costs and to recover such costs over a future period if the costs are determined reasonable by the Commission. Accounting orders are discretionary on the part of the Commission. In this case approving an accounting order would not be in recognition of unusual costs – perhaps beyond management control – for which the utility should have an opportunity to recover. Rather, approving an accounting order would reward questionable management decisions, and would amount to a prejudgment by the Commission of potentially very important revenue requirement and cost of service/rate design questions that are implicated by the NWE Application. Unless for some reason it is impossible, such questions should be answered by the Commission after appropriate process before NWE commits itself (perhaps unlawfully), and customers rely on such commitments.

#### Conclusions of Law

1. NWE is a public utility subject to regulation by the Public Service Commission. Section 69-3-101-102, MCA.

2. NWE provides regulated service pursuant to schedules on file with the Commission. Section 69-3-301, MCA.

3. NWE may not charge for regulated service at a rate other than that specified in a schedule that is applicable to the service provided. Section 69-3-305, MCA.

4. Changes to NWE's schedules must be approved by the Commission. Section 69-3-302, MCA.

Order

1. NWE's request for an accounting order is denied. Special service contracts referred to in this docket that contain rates, terms or conditions that violate applicable tariffs are not approved. The Commission makes no declaration on whether LP and Barretts presently qualify to take electricity under the NWE GS-2 schedule.

2. The requests by LP and Barretts for oral argument prior to the issuance of this Order are denied.

DONE AND DATED this 18th day of December, 2002, by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GARY FELAND, Chairman

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JAY STOVALL, Vice Chairman, Dissenting

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BOB ANDERSON, Commissioner

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MATT BRAINARD, Commissioner

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BOB ROWE, Commissioner, Dissenting

ATTEST:

Rhonda J. Simmons  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. According to ARM 38.2.4806, a motion to reconsider generally must be filed within ten (10) days. For purposes of this order, the time within which to request reconsideration is extended to 30 days.